NOT YET SCHEDULED FOR ORAL ARGUMENT

In the

United States Court of Appeals
for the District of Columbia Circuit

16-1332
Consolidated with 16-1379

CVS ALBANY, LLC, d/b/a CVS,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW AND CROSS APPLICATION FOR ENFORCEMENT FROM THE NATIONAL LABOR RELATIONS BOARD IN NLRB NO. 29-CA-179095

FINAL BRIEF FOR PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties and Amici.

A. Petitioner/Cross-Respondent CVS Albany, LLC ("CVS" or "Petitioner/Cross-Respondent") submits the following as a list of known parties appearing in this Court in this matter:

National Labor Relations Board, Respondent/Cross-Petitioner

CVS, Petitioner/Cross-Respondent.

B. CVS submits the following as a list of known intervenors appearing in this Court in this matter:

None

C. CVS submits the following as a list of known amici appearing in this Court in this matter:

None

II. Rulings Under Review.

The following rulings issued by the National Labor Relations Board are at issue in this matter:

CVS Albany, LLC d/b/a CVS *and* Local 338 Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW), Case No. 29-CA-179095, reported at 364 NLRB No. 122; issued September 15, 2016.

III. Related Cases.

This matter on review has not previously been before this Court or any other court. There are no related cases, to CVS' knowledge and information.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1 and to enable the members of this Court to evaluate possible disqualification or recusal, the undersigned counsel for hereby certifies that CVS is owned by CVS Pharmacy, Inc., which is in turn owned by CVS Health Corporation, which is publicly-traded on the New York Stock Exchange. CVS operates retail pharmacies and general goods stores.

Respectfully submitted,

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GLOSSARY

"CVS" or "Employer" means CVS Albany, LLC

"JA ___" means references to the Joint Appendix

"NLRA" or "Act" means the National Labor Relations Act

"NLRB" means the National Labor Relations Board

"Store 2812" means CVS' store located at 1070 Flatbush Avenue in Brooklyn, New York

"Union" means Local 338 Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW)

STATEMENT IN SUPPORT OF ORAL ARGUMENT

CVS respectfully requests oral argument in this case. In light of the factual and legal complexity of the issues presented regarding the National Labor Relations Act ("NLRA" or "the Act") and other laws and cases, oral argument will assist the Court in reaching a full and complete understanding of the issues and allow counsel to address any questions from the panel.

STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Section 10(f) of the NLRA because the September 15, 2016 "Decision and Order" of Respondent National Labor Relations Board ("NLRB" or Board") is a final order. 29 U.S.C. § 160(f). CVS is a party aggrieved by that Decision and Order. CVS timely filed its Petition for Review on September 22, 2016.

STATEMENT OF ISSUES

1. Whether CVS's Petition for Review should be granted, and the Board's Cross-Application for Enforcement should be denied, because in issuing its Order, the Board relied on a certification of representative resulting from an election in which the Board abused its discretion by sustaining challenges to three election-determinative ballots, thereby disenfranchising voters, compromising the integrity of its election and certification, and disregarding its fundamental policy to afford employees the broadest possible participation in Board elections?

2. Whether CVS's Petition for Review should be granted, and the Board's Cross-Application for Enforcement should be denied, because the Board failed to properly apply the standards set forth in Associated Milk Producers, Inc. v. NLRB, 193 F.3d 539 (D.C. Cir. 1999) denying enforcement of Associated Milk Producers, Inc., 326 NLRB No. 146 (1998) and Caesar's Tahoe, 337 NLRB 1096 (2002)?

3. Whether CVS's Petition for Review should be granted, and the Board's Cross-Application for Enforcement should be denied, because the Board's Order contravenes established Board precedent?

4. Whether CVS's Petition for Review should be granted, and the Board's Cross-Application for Enforcement should be denied, because the Board's Order is arbitrary, not supported by substantial evidence, and not in accordance with law?

RELEVANT STATUTES AND REGULATIONS

Relevant provisions are contained in the Addendum at the conclusion of this brief.

STATEMENT OF THE CASE

CVS submits the instant Petition for Review to challenge the Board's certification of Local 338 of the Union as the exclusive bargaining representative of the following unit at its Store 2812 (also referred to herein as the "Flatbush store") located in Brooklyn, New York:

> All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors, but

> excluding all floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, managers and supervisors as defined in the Act.

(JA 300).

As set forth herein, the certification is invalid because the Board incorrectly sustained the challenges to three outcome-determinative ballots on the grounds the employees who cast them were considered "floaters," excluded from the ambiguously described voting unit. In doing so, the Board rushed to judgment, ignoring this Court's and its own precedent which required the Board to examine whether these three employees shared a community of interest with the other eligible voters in the unit.

From its inception in 1935, one of the core purposes of the NLRA has been to allow employees to exercise the right to support or not support a union in a Board-conducted election. The Board's short-circuited approach in this case has served to disenfranchise three voters – a result which flies in the face of the core purposes of the NLRA. As a result, CVS' Petition for Review should be granted and the Board's Cross-Application for Enforcement should be denied.

* * *

I. The Representation Petition, Stipulated Election Agreement, and Election

On July 14, 2015, the Union filed a petition for an election at the Flatbush store. (JA 182). The parties thereafter signed a Stipulated Election Agreement – agreeing to the above-referenced unit description – which was subsequently approved by Region 29 of the Board on July 23, 2015. (JA 182). The election was conducted on August 7, 2015, with the following results: four votes for the Union, three votes against the Union, and three ballots challenged by the Union. (JA 182).

II. The Post-Election Challenges Hearing and Hearing Officer's Decision

During a two-day hearing regarding the status of the challenged ballots held on September 3 and 10, 2015, the Union claimed that the three employees who cast challenged ballots were "floaters," who should be excluded from the voting unit. (JA 10). CVS asserted these three individuals were not "floaters," but rather were in the included classification "Clerk/Cashiers," and were eligible voters because they were regular part-time employees assigned to work at the Flatbush store. (JA 11-15).

On September 30, 2015, the Hearing Officer issued a Report on Challenged Ballots overruling the challenges to ballots cast by Debra Ellsmore and Debbie Henry-Aughton and sustaining the challenge to the ballot cast by Kane Chow. (JA 194-195). In his Report, the Hearing Officer first determined the Stipulated Election Agreement was ambiguous because the parties never defined the

term "floater." (JA 190-191). The Hearing Officer then determined that there was insufficient extrinsic evidence to conclude the parties had a "meeting of the minds on what constitutes a floater." (JA 191). As a result, the Hearing Officer then considered whether the three employees in question shared a community of interest with the other eligible employees. The Hearing Officer concluded Debbie Henry-Aughton and Debra Ellsmore shared a community of interest with the other employees because they shared the same general terms and conditions of employment as the other eligible voters. (JA 192-193). However, the Hearing Officer found Kane Chow lacked a community of interest with the other eligible voters because he purportedly did not "work with sufficient regularity at the Flatbush store…." (JA 193-194).

On October 21, 2015, the Employer filed Exceptions to the Hearing Officer's Report on Challenged Ballots disputing the decision regarding Mr. Chow.

III. The Regional Director's Decision

On November 18, 2015, the Regional Director issued his Decision and Direction to Count Two Determinative Challenged Ballots, essentially affirming the Hearing Officer's findings. (JA 197-209) The Regional Director, in concert with the Hearing Officer, held the Stipulated Election Agreement was facially ambiguous because the exclusion of "floaters" was subject to three plausible interpretations. Specifically, the Regional Director explained:

> (1) [t]he exclusion could reasonably be interpreted to apply only to employees in the floater job classification, i.e., pharmacist-floaters. Under this view, the disputed employees would not be excluded inasmuch as their job classification is clerk/cashier;
>
> (2) [t]he term floater could reasonably be read more expansively to refer to a general understanding of floater, i.e employees who move from store to store, without regard to the regularity of their employment at the Flatbush Avenue store. Under this view, the three disputed employees, whose home stores are other than the Flatbush Avenue store, would be excluded from the unit…; and
>
> (3) [t]he exclusion of floaters [could be] meant to apply only to employees who move from store to store who are not regular full-time or part-time retail employees at the Flatbush Avenue store. In support of this view, I note that the stipulated unit includes *all* regular part-time retail employees, including clerk/cashiers, and two of the three disputed employees have been found to be regular, part-time retail employees at the Flatbush Avenue store.

(JA 199-200).

The Regional Director then proceeded to find there was "insufficient extrinsic evidence to discern the parties' intent" regarding the term "floaters." (JA 202). In support of this finding, the Regional Director found that the Employer "does not maintain any retail floater classifications" and concluded that the record evidence did not "conclusively establish that the Employer regularly used the term floaters to refer to retail employees who worked at different stores or that the employees knew that the term was used by the Employer in that way." (JA 200-202). Additionally, the Regional Director found the term "floater" has different meanings

in different contexts, and because it is "not a legal term or word of art, reference to a technical meaning for clarification is unavailable." (JA 202).

Accordingly, the Regional Director proceeded to the third step of the Associated Milk Producers/Caesar's Tahoe analysis and correctly determined that Ms. Ellsmore shared a community of interest with the other unit employees. (JA 202-203).[1] Specifically, the Regional Director found that when Ms. Ellsmore worked at the Flatbush store, she reported to the same supervisor, had hours and wages similar to the other eligible voters, and interacts with the other employees at the Flatbush store. (JA 203).

The Regional Director incorrectly determined that Mr. Chow did not share a community of interest with other eligible voters. Although the Regional Director found "Chow's working conditions are similar to those of the other unit members and he interacted, albeit not extensively, with other employees during his time at the Flatbush Avenue store…," the Regional Director improperly concluded Mr. Chow lacked "regularity and continuity of work" at the Flatbush store during the two-month period prior to the election eligibility date, even though he worked at the Flatbush store an average of 11 hours per week during the 13 weeks preceding the election eligibility date. (JA 207). The Regional Director found this factor

[1] The Regional Director noted the Union did not file exceptions to the Hearing Officer's finding that Henry-Aughton shared a community of interest with the other unit employees. (JA 202).

outweighed the other factors militating in favor of a finding that Mr. Chow shared a community of interest with the other eligible voters. (JA 207).

IV. The Requests for Review

On December 16, 2015, CVS filed a request for review contending the Regional Director improperly sustained the challenge to Kane Chow's ballot. (JA 285-298). To this end, CVS challenged the Regional Director's finding on the grounds the Regional Director failed to demonstrate there were "special circumstances" to deviate from the Board's well-established objective rule for determining whether an employee qualifies as a regular part-time employee (i.e. the employee in question must work an average of at least four hours over the 13 weeks preceding the election's eligibility date). (JA 291-296). CVS argued that because Mr. Chow satisfied this threshold, the Regional Director had no basis to conclude he lacked a community of interest with the other eligible voters. (JA 291-296).

That same day, the Union filed a request for review arguing that all three challenges should have been sustained on the grounds all three employees were "floaters," and thus excluded from the unit. (JA 211-283).

On January 8, 2016, the Union and CVS each filed answering briefs. (JA 125-139, JA 140-146).

V. The Board's June 7, 2016 Decision

On June 7, 2016, the Board granted the Union and CVS' respective requests for review, and reversed the Regional Director's decision to count two of the determinative challenged ballots. (JA 300-302). The Board ruled that all three of the challenges should have been sustained finding that the three employees who cast the challenged ballots were "floaters" excluded from the unit set forth in the Stipulated Election Agreement. (JA 302).

Like the Hearing Officer and Regional Director, the Board applied the test set forth in Associated Milk Producers/Caesar's Tahoe to determine whether a voter is included or excluded from the stipulated unit, and found the unit description contained in the parties' Stipulated Election Agreement was ambiguous. (JA 300). However, the Board concluded the ambiguity could be definitively resolved through customary contract interpretation principles and an examination of extrinsic evidence. (JA 301-302). As a result, the Board reached a decision contrary to the Regional Director who found the same ambiguity surrounding the term "floater" could not be resolved except through an assessment of whether the employees who cast challenged ballots share a community of interest with other eligible voters. (JA 203-208). The Board erred in failing to properly apply the entirety of the Associated Milk Producers/Caesar's Tahoe test. Had the Board properly applied this

framework, it would have been constrained to count the ballots of the three challenged voters.

VI. Further Proceedings Before the Board

On June 20, 2016, the Board certified the Union as the exclusive collective-bargaining representative of the Unit in Case 29-RC-155927. (JA 306-308). On June 23, 2016, the Union requested that the Employer bargain with it as the exclusive collective-bargaining representative of the Unit. (JA 150). The Union also sent the Employer a request for information. (JA 150-151). On June 24, 2016, the Employer advised the Union that it would not bargain with it, nor honor its information request, based upon its intention to test the certification issued in 29-RC-155927. (JA 314, JA 323). On July 8, 2016, the Regional Director issued a Complaint in 29-CA-179095 asserting the Employer violated Sections 8(a)(1) and (5) by virtue of its failure to refuse to bargain in good faith with the Union. (JA 313-320). On July 22, 2016, the employer filed a timely Answer denying the allegations and asserting defenses. (JA 322-325).

On July 28, 2016, Counsel for the General Counsel (hereinafter "General Counsel") moved for summary judgment in connection with this matter. (JA 147-328). On August 3, 2016, the Board issued its Order Transferring Proceeding To The Board and Notice To Show Cause why the General Counsel's motion for summary judgment should not be granted. (JA 329). On August 17, 2016,

CVS filed its Reply to Notice to Show Cause and Response to General Counsel's Motion for Summary Judgment. (JA 330-338). On September 15, 2016, the Board granted the General Counsel's Motion for Summary Judgment. (JA 339-342).

On September 22, 2016, CVS filed its Petition for Review with this Court. On October 31, 2016, the Board filed its Application for Cross-Enforcement of its September 15, 2016 Order.

STATEMENT OF FACTS

I. Background Regarding Store 2812

CVS operates a store at 1070 Flatbush Avenue, Brooklyn, New York. (JA 46). At all relevant times, the following classifications of employees were employed in the retail section of the store: Store Manager, Assistant Manager, Shift Supervisor B, and Clerks/Cashiers. (JA 28, JA 117-119). All three ballots at issue in this case were cast by employees who hold the position of Clerks/Cashiers. (JA 55, 90, 109, JA 117-119). As pertinent herein, employees are assigned a "home store" which is where they receive paychecks, performance evaluations, and wage increases. (JA 32, 43, 88). Employees work at stores other than their "home store." (JA 31-33).

II. The Representation Petition, Stipulated Election Agreement, and Voter List

The Union's representation petition contained the following description of the unit:

> Included: All regular full time and part-time employees in the retail section of the store.
>
> Excluded: All employees in the pharmacy section of the store (including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians), floaters, seasonal employees, managers, and others statutorily excluded by the Act.

(JA 158-159).

Subsequently, in lieu of a hearing, CVS and the Union signed a Stipulated Election Agreement agreeing to the following unit:

> All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors, but excluding all floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, manager and supervisors as defined in the Act.

(JA 161-163).

The Stipulated Election Agreement does not define the term "floater."

* * *

After the Regional Director approved the Stipulated Election Agreement, CVS filed and served the voter list on the Union. (JA 117-119). All three employees whose ballots were challenged were included on the list. (JA 117-119).

III. The Placement of the Term "Floater" In The Stipulated Election Agreement

During the September 10, 2015 post-election hearing, the Hearing Officer asked the parties' respective counsel regarding why "floaters" were excluded

and what the definition of "floater" is. (JA 47). Union's counsel responded as follows:

> HEARING OFFICER: Okay. I would just like to get on the record, during the negotiation of the stipulated election agreement can you briefly explain to me why you excluded floaters and what the definition of floater is?
>
> For the Petitioner?
>
> MR. CHUN: During the negotiation of the agreement?
>
> HEARING OFFICER: Right.
>
> MR. CHUN: We believe there were individuals who did not have a sufficient community of interest with the rest of the voters and there were in particular three individuals who the Union organizers never saw at the store and upon speaking with our liaison at the store, it turned out they never heard of these three individuals as well, Henry-Aughton, Chow and Ellsmore.
>
> …
>
> At the end of the day, the essential quality is not to regularly work at the Flatbush location, but to move around from location-to-location. So we specifically excluded these individuals whose essential job is to move from location-to-location.

(JA 47-48).

* * *

> HEARING OFFICER: I have a question. So the exclusion includes all pharmacy employees and then it lists all the pharmaceutical titles, so why did the Employer not put it there or I mean wouldn't it be redundant to exclude all pharmacy employees and then exclude separate employees?
>
> MR. COOPER: The Employer did not write the stipulation. The stipulation was written by the Board, by a Board Agent. When the term

> floater appeared at the request of the Union, not at the request of management, CVS agreed to the exclusion of the floaters.
>
> CVS believed it was excluding a pharmacist floater, the only floater at CVS. Witnesses have already testified that the pharmacist floaters are known both as floaters and as pharmacist floaters.
>
> CVS never under any circumstances agreed to exclude regular part-time employees and it is obvious from the fact that within two days of the election CVS produced a voter list and the voter list contained these three names. This was not hidden from the Union.
>
> HEARING OFFICER: Okay, thank you.

(JA 49-50).

* * *

At the hearing, the Union did not present any evidence to the contrary.

IV. Other Extrinsic Evidence Regarding The Meaning of the Term "Floater" Presented At The Challenges Hearing

The term "floater" is never used by CVS to describe its retail workers. Ana Valentin, CVS' Senior Advisor of Human Resources, testified that the term "floater" refers only to pharmacist floaters and that this term does not exist with regard to retail store workers. (JA 27-30). Ms. Valentin explained that CVS supervisors would not use the term "floater" to refer to individuals working in the retail section of the store because the term does not exist in this context. (JA 37).

Ms. Valentin's clear testimony is in stark contrast to the inconsistent and ambiguous testimony offered by current and former CVS employees. There is no record evidence which establishes that the classification of "floaters" exists in the

retail section of the Flatbush store. For example, while Adrian Caddle, a Shift Supervisor, testified that a "floater is someone that basically goes from one location to the next…," he admitted he had never heard a CVS manager describe what the term "floater" means, and that he is unaware of any retail employee holding the "floater" position. (JA 17-18). The testimony offered by Mavis Wilson, a Clerk/Cashier, was also unenlightening. She admitted that she never heard any CVS managers or employees refer to retail employees as "floaters." (JA 19-20). Similarly, Temanie Barthelemy, a Shift Supervisor, could only *assume* a floater is "somebody that goes from store-to-store to help or cover a shift." (JA 21, 22). He too admitted he had never heard CVS managers or shift supervisors refer to or define the term "floaters." (JA 23). The testimony offered by Jason Ryan, a former Clerk/Cashier also should not be given any weight. All he could offer is that he heard the term "floater" once in a discussion with a manager (Walter Rodriguez) during a dispute over hours being assigned to perceived unknown employees. (JA 25-26).

Additionally, the testimony of the three employees whose ballots were challenged did not shed any light on the meaning of the term "floater." Ms. Henry-Aughton admitted that nobody at the Flatbush store ever told her she was a "floater" or that Ms. Ellsmore or Mr. Chow were "floaters." (JA 62). Similarly, Mr. Chow could only recall that he had heard the term "floater" previously from a manager he worked with at *another store* who stated the term related to someone who "jump[ed]

from store-to-store." (JA 90). Finally, without any further specification, Ms. Ellsmore testified a floater is someone who "come[s] and go[es]" to help out at other stores. (JA 106). None of these individuals testified that CVS had assigned them the title of "floater" or officially referred to them as a "floater."

V. The Employees Share A Community Of Interest With Other Eligible Voters

The Hearing Officer and Regional Director, relying upon uncontroverted testimony, concluded Mmes. Ellsmore and Henry-Aughton shared a community of interest with other eligible voters. While both the Hearing Officer and Regional Director determined that Mr. Chow shared the same general terms and conditions of employment as fellow voters, both erred in finding that Mr. Chow did not share a community of interest with those voters because of his supposed lack of continuous and regular employment at the Flatbush store.

A. Debra Ellsmore Shares A Community of Interest With The Other Eligible Voters

Ms. Ellsmore, a full-time Clerk/Cashier, works at five Brooklyn CVS stores, including the Flatbush store at issue in the present case. (JA 95, 111).[2] Ms. Ellsmore acknowledged that her classification is Clerk/Cashier. (JA 109). Ms. Ellsmore orders Hallmark greeting cards, organizes and maintains the greeting card

[2] In fact, Ellsmore's home store when she was hired was the Flatbush store. (JA 101).

displays, and stocks greeting cards at the five stores to which she is regularly assigned. (JA 96, 99). Ms. Ellsmore works twice per week at the Flatbush store and reports her schedule to the Flatbush store manager. (JA 114, 116). Generally, if Ms. Ellsmore decides to take a personal day, she advises the manager of the store or stores in which she is scheduled to work of her planned absence. (JA 112-113). Ms. Ellsmore is invited to attend store-wide meetings at all the stores at which she works. (JA 111).

Ms. Ellsmore testified that she has extensive interactions with other sales people in the Flatbush store, including working with her co-workers in fulfilling bargaining unit tasks. (JA 110). If a customer has a question about a particular Hallmark card issue, and Ms. Ellsmore is not working in the particular store where the question was asked, typically another Clerk/Cashier will assist the customer. (JA 108). Ms. Ellsmore reports issues with customers to the store manager. (JA 113). Ms. Ellsmore testified that she knows most of her colleagues at the Flatbush store. (JA 106-107).

B. Kane Chow Shares A Community of Interest With The Other Eligible Voters

1. Mr. Chow's Working Conditions

Mr. Chow holds the position of Clerk/Cashier. (JA 90). Mr. Chow works at multiple stores performing bargaining unit work (in the retail areas of the store). (JA 24, 57, 73, 85). Like other Clerk/Cashiers, Mr. Chow organizes stock in the

stores' basements, stocks shelves in the retail area of the stores, and completes Plan-O-Grams. (JA 85). Indeed, Mr. Chow works side-by-side with other employees in the unit doing precisely the same work at the same time. (JA 85-86).

When Mr. Chow is assigned to a store by his District Manager it is primarily to work in the store's storage areas to organize and prepare merchandise for display on the selling floor. (JA 83-84). Mr. Chow supplements the work of the store's Clerk/Cashiers who may not be able to keep up with the demand of rotating and organizing stock. (JA 76, 78, 34-36). That is why the District Manager assigns Mr. Chow to stores in the District Manager's district. It is not that Mr. Chow is assigned to a store to do work that is not the responsibility of bargaining unit members. The work Mr. Chow performs is the same work performed by other Clerk/Cashiers. (JA 34-36).

When Mr. Chow is assigned to a store such as the Flatbush store to assist with organizing and preparing stock for display, he pays regular visits to stores to which he is assigned. (JA 81). In the case of the Flatbush store, Mr. Chow began working at the store in February 2015 and worked there regularly every week for four months and then less frequently up to the day of the election. (JA 120-122, JA 81).

Notably, when Mr. Chow is assigned to a store, he is not supervised by the District Manager. Rather and like other employees in the unit, he is supervised

by the store manager and the other managers in the stores to which he is assigned. (JA 16, 73-74, 86).[3]

2. **Mr. Chow Is A Regular Part-Time Employee**

Pursuant to the parties' Stipulated Election Agreement, "[t]hose eligible to vote in the election [were] employees in the ... [unit] who were employed during the payroll period ending July 18, 2015…." (JA 161-163). Accordingly, the critical period of examination to determine regular part-time status commenced 13 weeks earlier, with the payroll period ending April 18, 2015. Chow worked 153.7 hours at the Flatbush store during the critical period, an average of 11.82 hours per week during that time. (JA 120-122).

The hours Mr. Chow worked at the Flatbush store during the critical period constituted approximately 33 percent of the time he worked for the Employer during that period (JA 120-122). He also worked about a third of his time during the critical period at Store 2431 (also referred to herein and during the hearing as the "Flatlands store"), performing the same kind of work he did at the Flatbush store during the pertinent period. Not only did Mr. Chow perform the same kind of work at both stores during the relevant time frame, all of the work he performed was work that bargaining unit employees perform on a regular basis (JA 73, JA 83-84).

[3] For example, when Mr. Chow needs a day off, he speaks with the store manager in the store in which he is working. (JA 87).

C. Debbie Henry-Aughton Shares A Community of Interest With The Other Eligible Voters

In the spring of 2014, CVS hired Henry-Aughton to work at its Flatlands, Brooklyn store. (JA 51). In early 2015, Henry-Aughton contacted the Flatbush store manager to ask if she could work extra shifts at the Flatbush store. (JA 54-55). Typically, Henry-Aughton worked approximately 12 hours per week (3:00 p.m. – 9:30 p.m. shifts on Sundays and Tuesdays) at the Flatbush store. (JA 60). Henry-Aughton continued to work at the Flatlands store during the period leading up to the election and hearing. (JA 56, 61). Henry-Aughton performs the same work at the Flatbush and Flatlands stores, i.e. cashier work and unloading merchandise. (JA 55, 61). Henry-Aughton likewise is supervised by the Flatbush store manager and reports issues with customers to the store manager. (JA 65-66).

VI. The Union's Failure to Challenge Other Similarly-Situated Employees

It is noteworthy that during the 13 week period preceding the July 18, 2015 eligibility date, three other eligible voters – Rafael Ozuna, Adrian Caddle, and Jean Camara, worked on average of 12.93, 7.15, and 5.05 hours per week respectively at CVS stores *other* than the Flatbush store. (JA 123-124).

It is significant that the Union did not challenge the ballots of Messrs. Ozuna, Caddle, or Camara despite the fact that, like the three employees whose ballots the Union did challenge, each worked a significant number of hours at other CVS locations besides the Flatbush store during the critical 13-week period

preceding the eligibility date in this case. In fact, each would be considered regular part-time employees at these other locations and would comport with the Board's definition of the term "floater" in this case. Thus, by sustaining the challenges in this case, the Board essentially permitted the Union to pick and choose which employees had the right to vote. Such an outcome is simply inconsistent with the primary purposes of the Act, which are designed to give regular employees, *not a union*, a say in whether they wish a labor organization to serve as an exclusive bargaining representative.

SUMMARY OF ARGUMENT

The Board applies a three-part test to determine whether an individual whose ballot has been challenged should be included in a stipulated unit. Associated Milk Producers, Inc. v. NLRB, 193 F.3d 539, 543 (D.C. Cir. 1999); Caesar's Tahoe, 337 NLRB 1096, 1097 (2002). First, if the applicable stipulated election agreement is unambiguous, the Board will simply enforce the terms as to a challenged ballot. Associated Milk Producers, 193 F.3d at 543; Caesar's Tahoe, 337 NLRB at 1097. If the terms of the agreement are ambiguous, the Board looks to the intent of the parties using the normal methods of contract interpretation, including examination of extrinsic evidence. Id. If the parties' intent remains unclear, the Board applies the standard community of interest test. Id. See also International Union of Elec., Radio and Mach. Workers v. NLRB, 418 F.2d 1191, 1201 (D.C. Cir. 1969)(explaining de

novo review is appropriate to ascertaining bargaining unit if parties' intent cannot be determined).

In the present case, the Board correctly reached the conclusion that the Stipulated Election Agreement was ambiguous. However, the Board incorrectly held the ambiguity could be resolved without consideration of the traditional community of interest factors, relying instead only on contract interpretation principles and other extrinsic evidence. The Board concluded that the term "floater" is undefined and ambiguous. But the Board incorrectly relied upon the subjective beliefs of employees as to the meaning of the term "floater" which cannot be used to establish what the Employer's *regular* use of the term is. Such analysis did not decisively resolve the ambiguity surrounding the meaning of the term "floater."

The Board erred by ending its inquiry at the second step of the Associated Milk Producers/Caesar's Tahoe framework. The Board was required to consider the traditional community of interest factors because the testimony offered by various employees did not conclusively establish the parties' intentions of the meaning of the term in dispute. Had it engaged in the community of interest analysis, the Board would have concluded that all three employees who cast challenged ballots shared a community of interest with the other eligible voters and should have participated in the election. The Board's failure to do so served to disenfranchise these three employees which runs contrary to the salutary purposes of the NLRA.

Accordingly, the Petition for Review should be granted and the Board's Application for Cross-Enforcement should be denied.

BASIS FOR STANDING

CVS was the Respondent which defended against the claims in the underlying administrative proceedings before the Board. As a person aggrieved by a final order of the Board, CVS has standing to obtain review from this Court pursuant to 29 U.S.C. § 160(f).

ARGUMENT

STANDARD OF REVIEW

Union election proceedings are not directly reviewable by the courts. Therefore, an employer seeking review of the Board's certification must first refuse to bargain with the union. On questions regarding representation, courts accord the Board a degree of discretion. Randell Warehouse of Arizona, Inc. v. NLRB, 252 F.3d 445, 448 (D.C. Cir. 2001) (internal citations omitted). This Court's "review of the Board's determination that a stipulated election agreement is ambiguous is *de novo*…, but the Board's factual determinations are conclusive if supported by substantial evidence on the record considered as a whole…." Hard Rock Holdings, LLC v. NLRB, 672 F.3d 1117, 1120-1121 (D.C. Cir. 2012). When the Board "acts, however, Congress requires it to act in a reasoned fashion, not arbitrarily and capriciously." See Nathan Katz Realty v. NLRB, 251 F.3d 981, 994 (D.C. Cir. 2001)

(internal citations omitted). "If the Board chooses to exercise its discretion, it must explain its action, and its explanation must reflect reasoned decisionmaking. Id. (internal citations omitted). In general, this Court has "repeatedly told the Board that 'silent departure from precedent' will not survive judicial scrutiny." Randell Warehouse of Arizona, 252 F.3d at 448. (internal citations omitted).

Although this Court's review is deferential, it is "not merely 'the Board's enforcement arm. It is [this Court's] responsibility to examine carefully both the Board's findings and its reasoning….'" Id. (Internal citations omitted). Significantly, "the Board cannot ignore its own relevant precedent but must explain why it is not controlling." Id. (internal citations omitted).

POINT I

THE BOARD CORRECTLY HELD THE STIPULATED ELECTION AGREEMENT IS AMBIGUOUS

CVS does not dispute the Board's finding that the Associated Milk Producers/Caesar's Tahoe standard applies to these circumstances or that the Stipulated Election Agreement is ambiguous. Thus, the Board correctly held that "the Stipulated Election Agreement is ambiguous with respect to the meaning of the excluded category of 'floaters,' because the Employer does not maintain any such job classification and the agreement itself does not define the term." (JA 301).

POINT II

THE BOARD ERRED IN CONCLUDING THAT THE AMBIGUITY CONTAINED IN THE STIPULATED ELECTION AGREEMENT COULD BE RESOLVED WITHOUT ANALYZING COMMUNITY OF INTEREST PRINCIPLES

As discussed herein, the Board incorrectly ruled that "usual methods of contract interpretation, including examination of extrinsic evidence" definitively resolve the ambiguity surrounding the interpretation of the term "floaters." (JA 301). As a result, it was incumbent upon the Board to proceed to the third step of the Associated Milk Producers/Caesar's Tahoe test. The Board's failure to do so constitutes reversible error.

A. The Board's Reliance On Customary Contractual Principles Fails To Resolve The Ambiguity Contained in the Stipulated Election Agreement

Although the Board correctly proceeded to the second step of the Associated Milk Producers/Caesar's Tahoe framework, it incorrectly determined the ambiguity pertaining to the meaning of the term "floater" could be resolved exclusively through contract interpretation principles and extrinsic evidence. To this end, the Board first found that the Employer and Regional Director's definition of the term "floater'…violate the well-established principle that no part of a contract's language should be construed in such a way as to be superfluous." (JA 301). According to the Board, the placement of the term "floaters" in the Stipulated Election Agreement could not refer to "pharmacist-floaters," because the word

"floaters" appears before any reference to employees assigned to work in the pharmacy. (JA 301). Despite this conclusion, the Board acknowledges that the Stipulated Election Agreement does not contain any reference to the term "pharmacist floater." (JA 301). As such, it is far from conclusive as to whether the placement of the term "floater" was intended as a modifier of "pharmacy employees" or a separate category of excluded employees.

The Board's finding also runs contrary to its own precedent. Kroger Co., 342 NLRB 202, 209 (2004), is particularly apt to the present case. There, the parties agreed that "office clerical employees" were to be excluded from the unit. The administrative law judge, whose decision the Board affirmed in pertinent part, noted that although the parties unambiguously excluded "office clerical employees" from the unit, it was ambiguous whether "failed claims" employees were considered "office clerical employees" and part of that excluded classification. Id. The administrative law judge noted "[t]he only extrinsic evidence of the parties' intent is the fact that if all four 'failed claims' employees fall outside of the 'office clerical' category, the stipulation excludes none of the employees at the [work site] as 'office clericals.'" Id. However, the administrative law judge refused to hold that "the exclusion of a category of employees in a stipulated election agreement is evidence of the parties' intent to exclude at least one employee from the bargaining unit, as being a member of that category." Id. at 210.

In USF Reddaway, 349 NLRB 329, 330 (2007), the Board performed a similar contractual interpretation analysis to the present case (albeit at the first step of the Associated Milk Producers/Caesar's Tahoe framework), finding:

> The problem in this case is that the unit description in the stipulation does not match the actual classifications of the Employer. The Employer's classifications are mechanic/fueler, mechanic/floater, parts/mechanic, fuel/tire/trailer employee, and equipment washer/general helper. If the stipulation were read literally, the unit would exclude all of these employees, for no such job is included in the stipulation. A more reasonable reading would be that all of these classifications were meant to be included, i.e., that the parties used shorter job designations in the stipulation. Under this approach the parts/mechanic would be included in the unit, under the term 'all mechanics'. However, even this interpretation is not supported by unambiguous language in the unit description. Thus, if the phrase 'all mechanics' was meant to include all mechanic positions, why does the unit description also separately list the trailer mechanic position? In these circumstances we find that the language of the stipulation is unclear as to the parties' intent concerning [the employee's] unit status.

Buckley Southland Oil, 210 NLRB 1060, 1061 (1974) also is instructive. There, the Board held that the parties did not reach a meeting of the minds with respect to the eligibility of seasonal employees as drafted in a stipulated election agreement. The Board noted that prior to the election, the parties agreed that if a certain seasonal employee attempted to cast a vote, his ballot would be challenged and resolved in post-election proceedings. Thus, the Board ruled that "if the parties were under the same impression of the status of their agreement...there would have been no need to await 'post election procedures' to determine [the

individual's vote because he]... would have been, by agreement of the parties, excluded from voting." Id.

This authority applies with equal force to the present case. The fact that the term "floaters" appeared in the list of excluded classifications *does not mean* that the parties intended that the three non-pharmacy employees the Union challenged be considered excluded "floaters." See Kroger Co. Additionally, CVS listed all three employees on the pre-election voter list. (JA 117-119). If there was a true meeting of the minds that these three individuals were excluded from the unit, the Employer would not have listed them on the voter list which was filed and served two days after the Regional Director approved the Stipulated Election Agreement and the Union would not have to wait until the instant post-election procedures to determine their eligibility. See Buckley Southland Oil.

It is also notable that the Regional Director made two critical findings which the Board seemingly ignored. First, the Regional Director found:

> The Employer does not maintain any retail floater classifications; the Pharmacist-floater is the only floater classification. This evidence could arguably indicate that the parties did not intend the term floaters to apply to any retail employees.

(JA 200).

Second, the Regional Director noted that:

> [w]ith regard to the fact that no employee matches the specific one-word title 'floater,' it is reasonable to read the reference to 'floaters' in

> the stipulation as all job classifications that include the word floater, i.e., pharmacist-floater.

(JA 200).

It is significant that after rejecting the Regional Director and CVS' interpretations of "floaters" on the grounds their readings purportedly render the term "floaters" superfluous, the Board found the Union's "interpretation is reasonable, and it provides effective meaning to the stipulated election agreement as a whole." (JA 301). The Board's conclusion ignores the fact that while an interpretation of ambiguous language may be subjectively reasonable, it does not necessarily reflect the intent of the parties. See USF Reddaway. As a result, the Board's failure to proceed to evaluate community of interest factors to resolve the ambiguity contained in the Stipulated Election Agreement was erroneous.

B. Extrinsic Evidence Regarding the Parties' Negotiations Leading to the Stipulated Election Agreement Fails to Resolve the Ambiguity

As a threshold dispositive matter, the Board disregards that it was the *Union* that sought the exclusion of floaters, that CVS knew that the only floaters it employed were "pharmacy floaters," also commonly referred to as just "floaters," and that it was a Board agent who made the decision as to where in the Stipulated Election Agreement to insert the job classification "floater." (JA 27-30, 49).

Second, the Board placed too much emphasis on where in the list of excluded classifications the parties placed the term "all floaters" in comparison to

the Union's original representation petition. Specifically, the Board found the fact "the parties moved the exclusion of 'all floaters' to the front of the list of excluded employees, before any mention, let alone enumeration, of pharmacy employees…strongly suggests that the parties did not intend 'floater' to refer to a category of employees in the pharmacy." (JA 301). Thus, the Board acknowledges that any significance pertaining to the term's placement is only a *suggestion* of the parties' intent, not a definitive resolution.

The Board's conclusion in this regard runs contrary to this Court's holding in Hard Rock Holdings, 672 F.3d at 1119, where extrinsic evidence failed to resolve an ambiguous stipulated election agreement. In Hard Rock Holdings, the parties agreed that employees who worked in the company's valet-parking department were properly included in the unit. However, the parties disagreed about whether bell-desk employees who occasionally worked as valets should also have been included in the unit (known as "dual rate" employees). Id. The record demonstrated that counsel for the union and employer had a brief telephone conversation prior to finalizing the stipulated election agreement during which the employer's counsel indicated that the employer "did not want anybody excluded who parked cars." Id. The Board agent subsequently faxed a proposed agreement to the employer's counsel containing the following voting unit: "[a]ll full-time and regular part-time [v]alet [p]arking employees." Id. The employer's counsel

contacted the Board agent to advise the employer would not agree to the term "regular," fearing the dual rate employees would be excluded. Id. The word "regular" was subsequently removed. Id.

The union challenged the ballots cast by those "dual rate" employees. On review, the Board determined the stipulated election agreement was ambiguous because "the wording was unclear as to whether the Company and the Union intended dual-rated employees to be included in the bargaining unit." Id. at 1121. The Board found that extrinsic evidence could not resolve the ambiguity – specifically the fact that the parties' lawyers "had had one brief telephone conversation about the composition of the unit, a conversation in which they disagreed" – was not dispositive. Id. As a result, the Board proceeded to determine whether the employees in question shared a community of interest with the other eligible employees, ultimately concluding they did not.

On review, this Court rejected the company's claim that the Board erroneously applied the second element of the Associated Milk Producers test. Specifically, this Court held:

> There was substantial evidence to support the Board's finding that the disagreement in the discussion of the stipulated unit by Company and Union counsel did not remove the ambiguity as to their intent regarding dual-rated employees. The hearing transcript showed that Company counsel's view of the unit was not the same as Union counsel's, and that during their brief conversation, the issue was not resolved. The Company also suggests that by agreeing to a revision of the stipulated agreement with the word 'regular' removed, the Union assented to a

> definition of the bargaining unit that included the eight dual-rated employees. As with the conversations between the negotiators, however, this bargaining history is ambiguous. For instance, it may be that the Union interpreted the revised text as expanding the bargaining unit merely to include the on-call attendants, whereas the Company's interpretation of the draft agreement already included the on-call attendants and therefore removing the word 'regular' from the agreement had the effect of adding the dual-rated employees to the unit.

Id. at 1122.

Butler Asphalt, 352 NLRB 189, 192 (2008), abrogated on other grounds by New Process Steel L.P. v. NLRB, 560 U.S. 674 (2010) is also instructive. There, the Board deemed extrinsic evidence – a change in language between what was contained in an election petition and ultimately in a stipulated election agreement – was "inconclusive" as to the parties' intent to exclude an employee from the unit. The Board noted the "language could have been changed for a reason or reasons unrelated to the parties' intentions with respect to [the employee in question]." Id. Similarly, Los Angeles Water and Power Employees' Association, 340 NLRB 1232, 1236 (2003) is particularly apt. The Board in that case rejected the employer's argument that because "the parties changed the words 'employed as' in the petition, to 'employees including' in the [stipulated election agreement] demonstrates their intent to broaden the unit to cover more than the specified job titles." Id. Instead, the Board found "[a]lthough this argument may be reasonable, we are unable to find that the modification of the petition language alone is conclusive evidence of the parties' intent." Id. As a result, the Board was constrained

to proceed to assess whether the employees in question shared a community-of-interest with the other eligible voters. See also Laneco Construction Systems, 339 NLRB 1048 (2003).

This authority establishes why the Board could not resolve the ambiguity pertaining to the meaning of the term "floaters" without reviewing community of interest factors as mandated in Associated Milk Producers/Caesar's Tahoe. Conspicuously absent from the Board's analysis is any explanation as to why the three employees who cast challenged ballots are "floaters" simply by virtue of where that term was placed in the Stipulated Election Agreement. The Board likewise ignores that even if the term "floaters" is not limited to pharmacy floaters, it is far from clear that the exclusion applies to the employees in question here. This Court's and the Board's precedent set forth in Hard Rock Hotels, Butler Asphalt, and Los Angeles Power and Water Employees Association, mandate the conclusion that the ambiguity contained in the Stipulated Election Agreement's unit description cannot be resolved from extrinsic evidence alone.

C. The Board Erroneously Relied Upon Employees' Subjective Views of the Term Floater

The Board also ignored the undisputed testimony that CVS does not utilize the "floater" classification except in the case of pharmacists. Instead, the Board considered the testimony of several current and former employees as to what *they* believed the term "floater" meant. The fact is, the subjective beliefs of

employees as to what the term "floater" means is of little consequence in this analysis and certainly does not establish what the CVS' "regular use of the classification[] in a manner known to its employees [is]…." National Public Radio, 328 NLRB 75, 75, n. 2 (1999).

As noted by the Regional Director, the evidence adduced at the hearing on this topic was far from uniformly conclusive:

> In this regard, I note that the evidence includes testimony of: the Senior adviser of Human Resources explaining that management commonly referred to pharmacist-floaters as floaters; several employees who never heard managers use or define the term floater; an employee who heard reference only to a floater in the pharmacy; a former employee who heard a manager refer to floaters in about January 2015; and, another employee who heard a manager (from a store other than the Flatbush Avenue store) refer to floaters about four years ago.

(JA 202).

Ignoring the Regional Director's findings, the Board omitted any reference to the unambiguous and uncontroverted testimony offered by the Employer's Senior Advisor of Human Resources, Ms. Valentin, who clearly explained that the term "floater" refers to pharmacist floaters and that no corresponding role exists in the retail area of the store. (JA 27-30). Ms. Valentin noted that she had never heard any supervisor referring to the term "floater" as it referred to individuals working in the retail section of the store. (JA 37). Ms. Valentin's testimony directly rebuts what other non-managerial witnesses testified

to regarding what they believed the term "floater" meant.[4] The Board also disregarded that the non-managerial witnesses who testified about their own impressions of the term "floater" admitted they were either not "floaters" themselves or never heard a manager describe the meaning of the term "floater" to them.[5]

Ms. Valentin's testimony should have been credited over the non-managerial employees' speculation as to what the term "floater" means.[6] At worst, the conflicting accounts between Ms. Valentin and the other witnesses who testified regarding this issue demonstrate that the evidence adduced in connection with the

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[4] During the hearing, in response to cross-examination by Union's counsel, Ms. Valentin testified that a floater is "Someone who floats, right? Somebody who, you know, goes multiple places. They kind of float around, they're kind of here, there and everywhere I mean…." But Ms. Valentin was describing the situation with respect to employees like the floaters in the pharmacy, who have no regularly assigned stores, and are assigned by a district scheduler wherever they are needed on a day-to-day basis to fill short term needs at pharmacies within the district. (JA 38-42). This description does not fit the three employees who cast challenged ballots in this case.

[5] To this end, the Board found an exchange between Jason Ryan and his manager, Walter Rodriguez, "particularly persuasive." (JA 301-302). The Board's rationale was that "Rodriguez was directly addressing Ryan's concern about unfamiliar employees working at the Flatbush store when, Ryan thought the Flatbush employees were not getting enough hours." (JA 301-302). The Board neglects to explain *why* this exchange is "particularly persuasive" or how it sheds light on the meaning of the term "floaters."

[6] While the term "floater" in the Stipulated Election Agreement is ambiguous, the term "Clerk/Cashier" is not. Accordingly, if a Clerk/Cashier satisfies the standard for being a regular part-time employee, the individual is properly included in the unit.

second step of the Associated Milk Producers/Caesar's Tahoe analysis in this case cannot be used to conclusively resolve the ambiguity contained in the Stipulated Election Agreement.[7]

* * *

As noted above, the extrinsic evidence relied upon by the Board in this case is far from conclusive and should have prompted the Board to continue to the third step of the Associated Milk Producers/Caesar's Tahoe analysis. Accordingly, because the Board erroneously relied exclusively upon extrinsic evidence in this regard, CVS' Petition for Review should be granted and the Board's Application for Cross-Enforcement should be denied.

POINT III

THE BOARD FAILED TO EVALUATE WHETHER THE EMPLOYEES WHO CAST THE DISPUTED BALLOTS SHARED A COMMUNITY OF INTEREST WITH OTHER ELIGIBLE VOTERS

As noted above, the Board committed reversible error by failing to proceed to the third prong of the Associated Milk Producers/Caesar's Tahoe framework and consider whether the three employees in question share a community of interest with the other employees in the unit. Had the Board correctly done so, it

[7] Significantly, the Board ignored the Regional Director's finding that "there is no specific Board definition of a 'floater…,' Board cases reveal different applications of the word 'floater…,' [and because] the term 'floater' is not a legal term or word of art, reference to a technical meaning for clarification is unavailable." (JA 202).

would have been constrained to conclude that all three employees who cast challenged ballots share a community of interest with those employees whose ballots were not challenged.

The Board's decision, if allowed to stand, will effectively disenfranchise these three employees. It is undisputed that Mmes. Ellsmore and Henry-Aughton share a community of interest with the other eligible voters and thus deserve the right to have their voices heard as to whether they wish to be represented by the Union. Additionally, Mr. Kane is disenfranchised because applying the Regional Director and Hearing Officer's expansive special circumstances test would render him ineligible to vote no matter when or for which store a representation petition is filed. These three employees' votes should not be nullified because the Board neglected to follow this Court's and its own precedent in opting not to evaluate whether they shared a community of interest with fellow voters.

As a threshold matter, it is undisputed the Union failed to challenge the Hearing Officer or Regional Director's finding that Ms. Henry-Aughton shares a community of interest with her fellow employees. (JA 202). Therefore, as found by the Regional Director, but ignored by the Board, there is no dispute over Ms. Henry-Aughton's inclusion in the unit presuming the third element of the Associated Milk Producers/Caesar's Tahoe case is applied. (JA 202). As discussed below, the record

evidence clearly establishes challenges to both Ellsmore and Chow's ballots should have been overruled and their ballots counted.

Generally, when determining whether employees share a community of interest with others, the Board considers "the employees' wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." Dodge of Naperville, Inc. v. NLRB, 796 F.3d 31, 38 (D.C. Cir. 2015)(internal quotations and subsequent history omitted). See also Publix Super Markets, 343 NLRB 1023, 1024 (2004)).

A. Ellsmore Shares A Community Of Interest With Other Employees

Ms. Ellsmore shares a community of interest with the other employees in the agreed-upon unit and, thus, the Board erred by failing to affirm the Regional Director's decision to overrule the challenge to her ballot. The record is clear that, at relevant times, Ms. Ellsmore had an expectation of working at the Flatbush store twice a week pursuant to a set schedule. (JA 114, 116). Ms. Ellsmore unquestionably worked in the store's retail area performing similar stocking and maintenance duties as other retail clerks and is thus functionally integrated with these other employees.

Ms. Ellsmore is supervised by the same managers as other eligible voters. If she decides to take a personal day, and cannot report to the Flatbush store, she advises the manager of the Flatbush store manager. (JA 112-113). Ms. Ellsmore

is invited to store-wide meetings at all the stores at which she works. (JA 111). As a result, given the overwhelming evidence supporting the conclusion that Ms. Ellsmore shares a community of interest with the other unit employees, this Court should direct the Board to overrule the challenge to her ballot.

B. Chow Shares A Community Of Interest With Other Employees

Mr. Chow's ballot should be counted because he is a Clerk/Cashier and shares a community of interest with the retail employees at the Flatbush store. As noted by the Regional Director, there is no serious dispute that "Chow's working conditions are similar to those of the other unit members and he interacted, albeit not extensively, with other employees during his time at the Flatbush Avenue store." (JA 207).

Again, the Board failed to address the community of interest factors as they relate to Mr. Chow and neglected to correct the Regional Director's failure to follow Davison-Paxon which articulated the Board's longstanding rule that:

> any contingent or extra employee who regularly averages 4 hours or more [of work] per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the union and may vote in the election.[8]

Mr. Chow met the Davision-Paxon criteria: he worked an average of 11 hours per week during the critical 13-week period. That there were weeks when Mr.

[8] 185 NLRB 24, 24-25 (1970).

Chow did not work at the Flatbush store is of no import because under established Board law a failure to work in the voting unit for some weeks of the pertinent 13-week period is not a disqualifying criterion for application of the Davison-Paxon formula.[9]

In Trump Taj Mahal Resort, 306 NLRB 294, 295 (1992) enf'd. 2 F.3d 35 (3d Cir. 1993), the Board majority—after noting that the Davison-Paxon formula "is the … most frequently used, absent a showing of special circumstances"—rejected a modification to the formula proposed by the dissenting member. The rejected modification would have required that "employees not only average 4 hours per week during the last quarter, but that they also work for some period during at least one-half of the weeks in that quarter." Id. at 295. In demonstrating the problems with such a requirement, the Board's majority stated:

> Moreover, our dissenting colleague's test, if applied here, would potentially include employees who have not worked many hours over the quarter prior to the eligibility date, as compared to other excluded employees on the list who might have worked many hours. For example, an employee working 46 hours in 1 week who then works 1 hour each week for 6 additional weeks, totaling 52 hours in the quarter preceding the eligibility date, would be included under this formula, while an employee who works 40 hours per week for only 6 weeks, totaling 240 hours during the same period, would be excluded. Thus, we think our colleague's proposed formula does not fairly measure an employee's regularity and continuing interest in employment.

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[9] Notably, the Regional Director did not cite any authority suggesting there is a purely objective test to determine whether an employee possesses sufficient regularity of work. (JA 205). As a result, the framework set forth in Davison-Paxon is the appropriate analysis in this case.

Id. at 296.

Since the Davison-Paxon criteria was established, the Board has consistently refused to carve out exceptions to the rule. Cf. Five Hospital Homebound Elderly Program, 323 NLRB 441 (1997) (Board unanimously held that an employee who averaged 4.2 hours a week during the 13 weeks preceding the eligibility date was eligible to vote even though the employee did not work during the six weeks leading up to the election's eligibility date); Saratoga County Chapter NYSARC, Inc., 314 NLRB 609, 610 (1994) (Board, finding no special circumstances to deviate from Davison-Paxon formula, reversed Hearing Officer who had attempted to balance out the spikes and low points in the employer's need for on-call drivers by using 12 months as the critical period (which included a significant spike during the summer months), rather than just the 13-weeks prior to the eligibility date).

Similarly, in the present case, in sustaining the challenge to Mr. Chow's ballot, the Regional Director concluded that Mr. Chow lacked regularity and continuity of employment because he did not work at the Flatbush store the last 49 days (seven weeks) of the 13-week eligibility period (May 30, 2015 through July 18, 2015). As a result, the Board erred by failing to find the Regional Director improperly created a special circumstance to deviate from the formula set forth in

Davison-Paxon and its progeny. The Board should have applied Davison-Paxon to enable Mr. Chow's ballot to count in the election.

* * *

Thus, CVS' Petition for Review should be granted and the Board's Cross-Application for Enforcement should be denied. At the very least, this case should be remanded to the Board so that it can determine whether the three employees in question share a community of interest with other eligible voters.

CONCLUSION

The Board's decision sustaining all three challenged ballots in this case is meritless based on the myriad of reasons described above. For all the reasons stated herein, and contrary to the Board's findings, conclusions, and order/remedies, CVS respectfully submits that this Court grant its Petition for Review and deny the Board's Cross-Application for Enforcement.

Respectfully submitted,

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Dated: April 17, 2017

Counsel for CVS Albany, LLC, d/b/a CVS

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that CVS' brief contains 9,837 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2013.

Respectfully submitted,

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United States Court of Appeals
for the District of Columbia Circuit

CERTIFICATE OF SERVICE

CVS ALBANY, LLC, d/b/a CVS, No. 16-1332
(Consolidated with 16-1379)

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by JACKSON LEWIS P.C. Attorneys for Petitioner to print this document. I am an employee of Counsel Press.

On **April 17, 2017**, Counsel for Petitioner has authorized me to electronically file the foregoing **Final Brief for Petitioner** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Linda Dreeben
Molly Sykes
Kira Delliniger Vol
National Labor Relations Broad
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Washington, DC 20570

In addition, 8 copies have been sent to the court on the same date as above.

April 17, 2017

/s/ Robyn Cocho
Robyn Cocho
Counsel Press

ADDENDUM

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Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 7. [29 U.S.C. § 157.]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 § 158.]

(a) [It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 10. [29 U.S.C. § 160.]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for

appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board

under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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